LEGAL BASES FOR EXTENSIONS OF TIME UNDER THE STANDARD FORMS OF CONTRACT

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INTRODUCTION

This Paper is intended to deal with the legal bases for extensions of time under the standard form head contracts and subcontracts in common use in Australia.

The head contract standard forms considered are E5b, AS2124-1981, NPWC3 and JCC A. The standard forms of subcontract dealt with are SCE3, AS2545-1982, SCNPWC3 and SCMBW1.

The paper is divided into two sections.

The first section (which is published in this issue of A.C.L.R.) deals with general principles relevant to extensions of time. The discussion of these general principles refers, where relevant, to provisions of the standard forms of head contract.

It is hoped that the discussion of these general principles will lend useful colour to the later consideration, of the specific extension of time clauses, which is contained in the second section of the paper to be published in the March 1986 issue of A.C.L.R.

1. GENERAL PRINCIPLES

1.1 OBLIGATION TO FINISH BY A DATE

1.1.1 Can the obligation be absolute?

Almost all construction contracts will specify a date by which, or a period within which, the works must be carried out. Indeed, consideration by the respective parties of this issue is a crucial aspect of the process of finalising the construction contract documentation.

While the standard form contracts and sub-contracts in use in Australia invariably allow for extensions of time, it is relevant to consider whether it is possible for contracting parties to provide that the obligation of the contractor to complete by the specified "completion date" is absolute.

The answer appears to be that the parties can so provide.

It has been held that, if the contract fixes the date or period for completion as an absolute fixed obligation, then the Courts will give effect to that provision. See *Jones v. St. John's College, Oxford* (1870) LR 6 QB 115, *Aurel Forras Pty. Ltd. v. Graham Karp Developments Pty. Ltd.* [1975] VR 202 at 211, and *Halsbury's Laws of England* Fourth Edition, Volume 4, paragraph 1182.

In such circumstances, the following appears to be the position:

(a) The contractor assumes a strict obligation to complete by that time.

(b) The contractor will not be relieved from his obligations merely on the grounds that he has been delayed by some neutral event or events (e.g. strikes, inclement weather) for which he is not to blame.

(c) The contractor will, however, be relieved of his obligation if the contract is discharged, e.g. by frustration. The Courts have historically been very reluctant to discharge a contract on the grounds of "frustration". However, the availability of that argument has been enhanced in light of recent cases such as *Codelfa Constructions Pty. Ltd. v. State Rail Authority of New South Wales* (1982) 56 ALJR 459, and *The Nema (Pioneer Shipping Ltd. v. B.T.P. Tioxide Ltd.)* [1982] AC 724.

(d) The owner will have difficulty enforcing the obligation where he has, by his own actions, prevented the contractor from completing the works within the requisite period. This is an issue which will be discussed in more detail in Section 1.4 below.

It appears clear that the courts will not find that the contractor has bound himself to an absolute obligation of timely completion unless clear and unequivocal words are used in the contract.

1.1.2 Effect of "Neutral" Events on Obligation to Complete

Generally speaking, events beyond the control of both the owner and the contractor will not relieve the contractor of his obligations for timely completion. Such events which include inclement weather, industrial disputation not related to the particular site, and the like, are referred to in this paper as "neutral" events.

There is a common misconception in the construction industry that the occurrence of neutral events, which are often referred to as "events beyond the control of the contractor", will automatically relieve a contractor of the obligation to finish by a due date, or put another way, entitle the contractor to an extension of time. This view is no doubt reinforced by the provisions of the standard forms of construction contracts, which do, in general, entitle contractors to claim extensions of time for some such neutral events.

The reason for such provisions regarding neutral events is that in their absence the risk for such events will rest on the contractor.

The mere provision for extension of time for neutral events will not necessarily relieve the contractor of this risk. For the contractor to be relieved of the risk the extension of time clause must operate so as to extend the date for completion. Whether the clause does so operate will probably depend, among other things, upon:

(a) compliance by the contractor with the necessary notice provisions of the particular clause; and

(b) the contractor establishing the requisite delaying effect of the neutral event.

1.2 WHAT IS COMPLETION?

The obligation to complete by a specified date cannot be adequately considered without a detailed discussion of the concept of "completion" of the works.

NOTE: This Paper was presented by the Author at a series of Seminars in Sydney and Melbourne in September 1985 entitled 'Quantification of Building Claims. Copyright is vested in the Author.

clause, and obliged the main contractor to make good the defects within a reasonable time of notification.[3] Dealing with the argument that only a nominated sub-contractor could carry out nominated sub-contract works, which the main contractor was not entitled to perform by himself, Wilson J disagreed. Article 1 of the Contract imposed an obligation (as also in the case of the JCT form, it may be commented) upon the contractor to carry out and complete "*the whole* of the Works". The defects liability clause required the contractor to make good *all* defects. If the nominated sub-contractor dropped out, and the architect did not choose to nominate another, the contractor had a choice of engaging another sub-contractor with consent, or of doing the work himself.[4] *Bickerton* and *Bilton* could not assist the main contractor, because of important respects in which Ed. 5b differed from the UK contracts. In particular, Wilson relied upon Clause 13 (c) as having no counterpart in the JCT contracts, and also on Clause 18 (c). There was, therefore, no gap such as had been discerned in the contract in *Bickerton* requiring the implication of a term.[5] A further consideration was that the contract did deal expressly, in Clause 15 (f) and (g), with defaults by nominated sub-contractors, and since the liquidation did not occur until April 1975, there was nothing in 1974 which entitled the main contractor to call for instructions at that time.[6] Liquidation 7 months later could not affect the rights long since vested in the employer.[7] Brennan J. also considered that it was unnecessary to consider the meaning and effect of the RIBA JCT contract which had been the subject of the *Bickerton* decision[8]. Under the RAIA contract, he took the view that the main contractor did have the right to carry out nominated sub-contract work. In particular, Clause 1 (imposing an obligation in regard to the whole of the works) and Clause 13 (c) placed ultimate responsibility for carrying out the whole of the work, including the nominated sub-contract work, upon the main contractor. In the present case he considered that the builder had a right or duty to do the nominated sub-contract work, and that if the nominated sub-contractor dropped out, then unless the absence of an Architect's Instruction made it impractical to identify the work remaining to be done, he was obliged to do that work himself; and the choice of the manner of doing so was left to him.[9] The work had been clearly identified in the notices received in May 1974.

5. In one respect, Brennan J disagreed with the views expressed in my principal Article, where I had suggested that the special machinery set up in Clause 15 of Ed 5b would, in any case, as a matter of damage and causation, be ineffective to enable an employer who had been obliged to compensate the main contractor to recover sums due from the defaulting sub-contractor in the name of the main contractor. Brennan J. cited the old case of *Constant v Kincaid* [10] as justifying such a remedy by way of sub-rogation [11].

   Brennan J also rejected the more general view I have expressed in *Hudson* and elsewhere to the effect that a defaulting sub-contractor will escape liability under any main contract which entitles the main contractor to compensation from the owner for a sub-contractor's default, on the interesting ground that the main contractor can still pursue the guilty sub-contractor for his full loss within the first branch of the rule in *Hadley v Baxendale*, it being immaterial that he would have no claim under the second branch of that rule. With respect, this misunderstands the argument. It has never been denied that the main contractor can recover his own loss from a guilty sub-contractor. What he cannot do, however, is to recover *the owner's loss*, if the main contract does not permit the owner to recover that loss from the main contractor. Nevertheless, it would represent a most valuable mitigation of the generally unenviable position of the owner in *Bickerton*-type cases if the contractor could recover the final cost of completion from the guilty sub-contractor, particularly if the owner could be subrogated to that right. It will be of the greatest interest to see if Brennan J's view is accepted by the Courts in later cases.

6. The judgments in the *Jennings* case in the High Court of Australia lend considerable support, it is respectfully submitted, to some of the main criticisms expressed in my principal Article in regard to the reasoning in *Bickerton*, though the support is admittedly only implicit, since it was not thought necessary to do more than emphasise the existence of one, and possibly two, relevant differing provisions in the Australian contract before the High Court. Nevertheless, it is clear that all three Judges felt no theoretical or conceptual difficulty in the legal proposition of a main contractor being responsible for carrying out and completing the whole of the works, including the nominated sub-contract work, so that upon default by the nominated sub-contractor his obligation would be to make other arrangements for completion. Nor do the judgments indicate any practical or commercial difficulties or constraints preventing the builder from doing the sub-contract work himself or making other arrangements. In both these respects there would appear to be a fundamental difference between the Jennings judgment and the basic reasoning of the Judges, and Lord Reid in particular, in the *Bickerton* case, disregarding altogether the arguments based upon the different wording of the particular provisions in the RAIAS contract. It must, of course, be conceded that Clause 13 (c) of Ed 5b though not nearly so explicit as Clauses 31 (2) and (3) of GC/Wks/1, does state more clearly than the RIBA contracts the intention that the main contractor should remain responsible for nominated sub-contract work. Indeed it was submitted, as long ago as 1970 in the tenth edition of Hudson, that in the RIBA case the draftsman did indeed attempt to provide to the same effect when using the typically opaque expression "and all specialists or others who are nominated by the Architect are hereby declared to be sub-contractors employed by the Contractor" ... in Clause 27 of the JCT Conditions. That argument cannot, however, be advanced in England until such time, if ever, as the House of Lords can be persuaded to review its original *Bickerton* decision on the RIBA wording.

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3. p 458 150-0459 112
4. p 459 1 41 — p 460 14
5. p 460 L1 32-40
6. p 461 1 44
7. p 462 1 15
8. p 466 1 29
9. p 468 1 11
10. (1902) 4 Sess.Cas.F. 901
11. The Jennings Case, p 470 L128-42

1.2.1 Common law rule of "entire contracts"

At common law, many contracts are treated as "entire contracts", i.e., that the entire fulfilment of the promise made by one party is a condition precedent to the right to payment.

The best-known example of this "entire contract" principle is the old case of *Cutter v. Powell* (1795) 101 ER 573. In that case the defendant agreed with a sailor at Jamaica as follows:

> "Ten days after the ship, *Governor Pary* ... arrives at Liverpool I promise to pay to Mr T. Cutter the sum of 30 guineas, provided he proceeds, continues and does his duty as second mate in the said ship from here to the port of Liverpool ..."

Mr Cutter died onboard the ship a few days out of Liverpool. The trustee of the deceased sailor's estate sued the defendant, but was held not to be entitled to recover a proportionate, or any, part of the agreed remuneration because completion of the voyage was a condition precedent to any payment.

1.2.2 Substantial performance/substantial completion

Construction contracts are usually "entire" contracts and a strict application of the "entire contract" principle to such contracts means that the contractor has to complete the work in all respects before the owner becomes liable to pay, and before the time obligations have been met. Thus, one could envisage the situation where a contractor could almost complete a project, or complete it except for a few defects, and the owner could avoid payment (unless the contract otherwise provided, and subject of course to arguments by the contractor based on prevention, acceptance, waiver or frustration).

The courts recognised that the strict application of the "entire contract" principle to construction contracts would cause undue hardship to the contractor. Thus, to overcome some of the difficulties of this rule the courts evolved the doctrine known as "substantial performance" or "substantial completion".

Under this rule, if the contractor can demonstrate that he has "substantially performed" his obligations under the construction contract, he can recover the contract price from the owner, but giving credit for any defects or deficiencies in the work. See *H. Dakin & Co. v. Lee* [1916] 1 KB 566, and *Hoenig v. Isaacs* [1952] 2 All ER 176.

As Denning L.J. (as he then was) said in *Hoenig v. Isaacs* (Supra) at page 180:

> "It was a lump sum contract, but that does not mean that entire performance was a condition precedent to payment. When a contract provides for a specific sum to be paid on completion of specified work, the courts lean against a construction of the contract which would deprive the contractor of any payment at all simply because there are some defects or omissions."

It should be noted, however, that if the parties use clear and unambiguous words, it is still possible for entire performance to be necessary, with the result that the "substantial completion" or "substantial performance" exception will not apply. See *Appleby v. Myers* (1867) LR 2 CP 651 and 661; *Hoenig v. Isaacs* (Supra) at 180.

1.2.3 What is "substantial completion" under a construction contract?

In *Hoenig v. Isaacs* (Supra) at page 179, Denning L.J. stated that the test to be applied was whether it could be said that the work had been "finished" or "done" in the ordinary sense, even though part of it was defective.

However, it is not sufficient to merely consider the cost of rectification alone. Both the nature of the defects and the proportion between the cost of rectifying them and the contract price must be considered.

It is useful to consider some of the decided cases on this point.

In *Hoenig v. Isaacs* (Supra), the contractor had been employed to decorate a one-room flat, and provide it with certain furniture, for a sum of 750 pounds. It subsequently transpired that the door of one wardrobe required replacing, that one book shelf would have to be remade, and that alterations would have to be made to a book case. The English Court of Appeal held that the contract had been substantially performed, and that therefore the contractor was entitled to recover the price, less the 56 pounds cost of remedying the defects.

In *Bolton v. Mahadeva* [1972] WLR 1009, the contractor had agreed to provide central heating (and hot water system) to a house for a price of 560 pounds. The defects were such that the system did not heat the house adequately, and fumes were given out so as to make living rooms in the house uncomfortable. The cost of remedying those defects was 174 pounds. The English Court of Appeal held that there had not been substantial performance of the contract, bearing in mind the relative costs of rectification, and considering the fact that the work was ineffective for its primary purpose.

1.2.4 "Substantial Completion" and time obligations

Although the position is not beyond doubt, it is arguable that substantial completion (as discussed above) will satisfy an obligation as to timely completion which is linked to some general words such as "complete the works by". The problem is however compounded where the time obligation is expressed to require the contractor to actually complete the whole of the works and comply in all respects with the requirements of the contract within the specified time. In such cases it is unlikely that the concept of substantial completion could be called in aid to relieve a contractor of the consequences of fulfilling such a draconian requirement within the time required.

1.2.5 "Completion" under standard form contracts

The standard form construction contracts presently in use in Australia embody a concept similar to the doctrine of "substantial performance", namely that of "practical completion".

E5b — Clause 25(a) requires the execution of the works to practical completion prior to the agreed date, subject to any extension of that date pursuant to the terms of clause 24.

NPWC3 — Clause 35.2 provides that the contractor is to execute the works to practical completion within the period specified in the contract, or any extended time granted pursuant to the contract. Where the contract provides for the completion of separable parts of the works, those parts are to be completed within the respective times specified.

AS2124 — 1981 — Clause 36.2 is to the same effect as clause 35.2 of NPWC3, both as regards execution of the entire works and of any separable part thereof (where applicable).

JCC A — Clause 1.02.03 provides that the building must bring the works to practical completion by the date for practical completion. The date for practical completion is defined by clause 1.06.10 to include any extensions of time under clause 9.

The concept of "practical completion" under the standard forms is relevant for the following reasons:

(a) satisfaction of the obligation of timely completion;

(b) release of some security and retention monies to the contractor;

(c) transfer of the risk of the property to the owner;

(d) commencement of the defects liability period; and

(e) termination of some of the superintendent's powers. For example, the normal and sensible provision is that any future variations should thereafter not be an obligation of the contractor because he has substantially completed his obligations. (See e.g. E5b clauses 25(h) and 26(b)).

The standard form contracts all contain a definition of "practical completion".

E5b

Clause 25(a) provides that practical completion means to bring the works "to a stage of being reasonably fit for use and/or occupation by the Proprietor".

AS2124 - 1981

Clause 1 contains the following comprehensive definition:

> "PRACTICAL COMPLETION is that stage in the execution of the work under the Contract when —
>
> (a) the Works are complete except for minor omissions and minor defects —
>
> (i) which do not prevent the Works from being reasonably capable of being used for their intended purpose, and
>
> (ii) in relation to which the Superintendent determines that the Contractor has reasonable grounds for not promptly correcting them, and
>
> (iii) rectification of which will not prejudice the convenient use of the Works, and
>
> (b) those tests which are required by the Contract to be carried out and passed before the Works are handed over to the Principal have been carried out and passed,
>
> (c) such documents and other information required under the Contract which, in the opinion of the Superintendent, are essential for the use, operation and maintenance of the Works have been supplied."

NPWC 3 — Clause 2 contains a comprehensive definition of "practical completion" which is in all material respects the same as the definition contained in AS 2124 - 1981, with the exception that NPWC3 specifically refers to separable portions in its definition.

JCC A — Clause 1.06.09 contains the following definition of "practical completion":

> 'The state of being substantially complete and fit for use and/or occupation by the Proprietor, all tests required under the provisions of this Agreement having been satisfactorily completed and omissions or defects being limited to items:
>
> (a) the immediate making good of which by the Builder is not practicable;
>
> (b) the existence of which and/or the making good of which by the Builder will not significantly inconvenience the Proprietor, taking into account the use or intended use of the items concerned and of the areas in which they occur; and
>
> (c) which do not cause any legal impediment to the Proprietor's use and/or occupation."

Although there is often considerable disputation about the date by which construction works are to be completed, it is obviously important to be able to establish when the obligation has been satisfied. In most cases the particular contract provisions regarding practical completion will be the yard-stick by which this will be measured. The concept which the standard forms appear to be seeking to express is one of having the works available for commercial use.

It is clearly essential for such a test of completion to be available but it is suggested that disputation can be reduced if, in particular cases, objective events can be nominated as triggering practical completion. For instance in relation to strata-title units, the satisfaction of all conditions precedent to registration of the unit titles is usually the most commercially significant test of completion.

1.3 OBLIGATION AS TO PROGRESS DISTINGUISHED FROM DATE FOR COMPLETION

It is necessary to distinguish between the contractor's obligations as to completion and his obligations as to satisfactory progress during the execution of the contract works.

This distinction is relevant because an owner's rights in respect of late completion can usually only arise when the date for completion has passed.

From a practical point of view, the rights and obligations of the parties during the construction process are of at least equal importance to the completion provisions. Depending upon the relevant provisions, it is possible to do something about dilatory performance during the work and thus alleviate the ultimate consequences. The provisions requiring specified completion dates are of little assistance in achieving this.

It is not proposed to discuss in detail the obligations which can be used to remedy dilatory performance. It suffices to make two points. Firstly, in the absence of specific provisions to similar effect, it is probably an implied term of construction agreements that a contractor has an obligation to progress the works with reasonable expedition and diligence.

Secondly, standard form contracts, in addition to providing for completion by a stated date, require the contractor to proceed "diligently" or "with due expedition", or similar expressions — E5b clauses 5 and 24(h); NPWC3 clauses 34.1 and 35.1; AS2124 — 1981 clauses 28.1, 34.1 and 34.2; and JCC A clauses 1.03 and 1.02.02.

A failure by the contractor to comply with those clauses may well constitute "default" under the default provisions — E5b clause 22, NPWC3 clause 44, AS2124 — 1981 clause 48, and JCC A clause 12.

The use of the default provisions provides an owner with

a very powerful legal weapon but because the remedy is so draconian, and the consequences of a wrongful use by the owner so serious, its value as a practical means of correcting dilatory performance is somewhat limited.

1.4 PREVENTION PRINCIPLE IN RELATION TO ENFORCEMENT OF TIME OBLIGATIONS

1.4.1 Introduction

An owner's usual remedy for failure by the contractor to "complete" or "practically complete" on or before the "date for completion" is liquidated damages. See E5b clause 27, NPWC3 clause 35.5, AS2124 — 1981 clause 36.5, and JCC A clause 10.14.

The discussion in sections 1.4.2 to 1.4.4 considers the impact, upon the owner's rights to liquidated damages, and upon the contractor's obligations regarding timely performance generally, of any acts of the owner which delay the contractor.

1.4.2 The "Peak" principle

The case of *Peak Construction (Liverpool) Ltd. -v- McKinney Foundations Ltd.* (1970) 1 BLR 111, is a well known decision in this area.

In that case the main contractor (Peak) had contracted with the owner (Liverpool Corporation) for the erection by Peak of certain high rise buildings. McKinney was the nominated sub-contractor for the foundations. The completion date under the head contract was 17.2.66. McKinney completed the piling work for the foundations on or about July 1964. However, on 2.10.64 a serious defect in one pile was found, and that defect had been caused by a breach by McKinney. All work on site was suspended, pending the rectification of that faulty piling by McKinney. Disputes arose between Peak, The Liverpool Corporation, and McKinney concerning the best way to rectify the defects. After many delays, the Liverpool Corporation finally authorised McKinney to commence rectification work on 30.7.65, and normal work under the project recommenced on 12.11.65.

Thus there had been a delay of some 58 weeks. Work had originally been suspended on 6.10.64, and normal work on the project was not recommenced until 12.11.65.

In those circumstances, Liverpool Corporation (as owner) sought liquidated damages from Peak (as main contractor), and Peak in turn sought liquidated damages for that entire period from McKinney (as nominated sub-contrator).

The English Court of Appeal held that the main contractor was not entitled to recover the liquidated damages from the nominated sub-contractor. The basis for this was that the owner was not entitled to recover those liquidated damages from the main contractor, as at least part of the 58 week delay had been caused by the owner, and the extension of time clause in the head contract did not enable the owner to extend for its own delays (and indeed no attempt had been made by the owner to so extend), and accordingly there was no date from which liquidated damages (under the head contract) could run.

As Salmon L.J. stated at page 121:

> "A clause giving the employer liquidated damages at so much a week or month which elapses between the date fixed for competion and the actual date of completion is usually coupled, as in the present case, with an extension of time clause. The liquidated damages clause contemplates a failure to complete on time due to the fault of the contractor. It is inserted by the employer for his own protection; for it enables him to recover a fixed sum as compensation for delay instead of facing the difficulty and expense of proving the actual damage which the delay may have caused him. If the failure to complete on time is due to the fault of both the employer and the contractor, in my view, the clause does not bite. I cannot see how, in the ordinary course, the employer can insist on compliance with a condition if it is partly his own fault that it cannot be fulfilled: *Wells -v- Army & Navy Co-Operative Society Ltd.; Amalgamated Building Contractors -v- Waltham Urban District Council;* and *Holme -v- Guppy*.
>
> I consider that unless the contract expresses a contrary intention, the employer, in the circumstances postulated, is left to his ordinary remedy; that is to say, to recover such damages as he can prove flow from the contractors' breach. No doubt the extension of time clause provided for a postponement of the completion date on account of delay caused by some breach or fault on the part of the employer, the position would be different."

It is suggested that the following is the position on the basis of the present authorities:-

(a) An owner will lose the right to claim liquidated damages if some of the delay is due to his act or default, unless:-
   - (i) the extension of time clause expressly (or by necessary implication) allows for extensions to be granted in respect to delays caused by acts or defaults of the owner; and
   - (ii) an extension has been validly granted therefor.

(b) Where both (i) and (ii) in (a) are not satisfied, then the consequences of (a) will flow even if the owner's delays are part only of the delay — the Court will not seek to apportion delay, at least when considering the enforceability of the liquidated damages clause.

(c) The consequences in (a) will flow even if the contractor would have been unable to complete on time even if there had been no delay by the owner — see *SMK Cabinets -v- Hili Modern Electrics Pty. Ltd.* [1984] VR 391, at 398-400.

(d) If the liquidated damages clause is held inoperative because of the application of this principle, the owner will still be entitled to sue the contractor for any damages that he can prove flow from the contractor's default. See *Peak -v- McKinney* (Supra) at page 121 per Salmon L.J., page 126 per Edmund Davies L.J.: and *Hudson* page 633. (Subject, of course, to the argument that the owner's general law damages are limited to the amount specified in the liquidated damages clause, as that clause can be seen as a limitation on total liability for delay.)

(e) The question of what acts or defaults of the owner are relevant for the purpose of (a) above is discussed in section 1.4.3. below.

1.4.3. What acts or omissions of the owner will enliven the "Peak" principle?

While it is easy to state the "Peak" principle in general terms, it is more difficult to identify just what "acts or omissions" of the owner will bring that principle into operation. As Brooking J. said in *SMK Cabinets -v- Hili Modern Electrics Pty. Ltd.* (Supra) at page 395:

"A wide variety of expressions have been used to describe the act of prevention which will excuse performance."

The most useful way to address the question is to identify the various expressions used in the cases:

(a) At times, words are employed which suggest that any act or omission preventing performance will suffice — see *Dodd -v- Churton* [1897] 1 QB 562, where all three members of the Court speak of an act; *Bruce -v- The Queen* (1866) 2 WW & A'B (L) 193, at 221, where the Court refers simply to prevention; and *Percy Bilton Ltd. -v- Greater London Council* [1982] 1 WLR 794 at 801 ("acts or omissions").

(b) *Hudson* at page 631 speaks of acts, whether authorised by or breaches of the contract, but at page 700 refers to wrongful acts.

(c) The expressions used by Salmon L.J. and Phillimore L.J. in *Peak Constructions (Liverpool) Ltd. -v- McKinney Foundations Ltd.* (Supra) at pages 121 and 127 are "fault", and "fault" or "breach of contract" respectively.

(d) Another phrase to be found is "act or default"; *Amalgamated Building Contractors Ltd. -v- Waltham Holy Cross Urban District Council* [1952] 2 All ER 452 at 455, per Denning L.J. (as he then was).

(e) Words used by Lord Denning ("His conduct - it may be quite legitimate conduct, such as ordering extra work") appear in a passage cited with approval in the leading speech in House of Lords in *Trollope & Colls Ltd. -v- Northwest Metropolitan Regional Hospital Board* [1973] 1 WLR 601 at 607.

(f) In *Ottaway Northern and Western Railway Co. -v- Dominion Bridge Co.* (1905) 36 SCR 347 at 359, Davies J. of the Supreme Court of Canada said "if the owner by the ordering of extra work or by the doing or omitting to do any act which he ought to have done or omitted has delayed the contractor in beginning the work or necessarily increased the time for finishing the work he thereby disentitles himself to claim the penalties for non-completion provided by the contract".

(g) In *SMK Cabinets -v- Hill Modern Electrics Pty. Ltd.* (Supra) Brooking said at page 396 "any formulation must accommodate the case of the ordering of extras, whether or not in the exercise of a power conferred by the contract". His Honour did, however, at page 396 state that the ordering of extras by the principal under a specific clause in the contract will only be "delay" by the owner for present purposes if there is no clause in the contract which "makes it clear that the contractor is undertaking to complete by the due date notwithstanding extras or other variations".

1.4.4 Effect of the prevention principle — time "at large"

There was nothing new about the "Peak" principle. It is well established law that one contracting party cannot complain of a breach by the other of an obligation which the complainant has prevented the other from complying with. See *Halsbury's Laws of England*, 4th Edition, Volume 9, paragraph 518, and the cases cited therein; and *Comyns' Digest* Condition L(6).

Although the *Peak Case* and others which deal with the same issue, have been concerned with the application of liquidated damages, it is suggested that the underlying reasoning is as follows:

(a) the owner has prevented the contractor from completing by the due date;

(b) the owner is thereby unable to insist that the contractor complete by that date

(c) the owner cannot substitute or has not substituted another date for completion which takes account of the owner's acts of prevention;

(d) there is thus no date from which to calculate the liquidated damages provided for in the contract.

Leaving aside the question of liquidated damages, it is possible to express the effect of this prevention principle in terms of broader application. When the principle is brought into operation, the owner cannot require the contractor to complete by the date nominated in the contract, or by any other date which can be ascertained by reference to the specific provisions of the contract.

This is the situation which is sometimes described in the industry as time being "at large".

What is the obligation as to completion in these circumstances? Put simply, it is to complete within a reasonable time and failure by a contractor to do so will entitle an owner to the common law damages discussed above.

What is a "reasonable time"? This is not a simple question.

In *Trollope and Colls Ltd. -v- Northwest Metropolitan Regional Hospital Board* [1973] 1 WLR 601, Lord Denning M.R., in the Court of Appeal, stated that *Dodd -v- Churton* [1897] 1 QB 562 was authority, amongst other things, for the following propositions:-

> "The time becomes at large. The work must be done within a reasonable time — that is, as a rule, the stipulated time plus a reasonable extension for the delay caused by his conduct. That was established by *Dodd -v- Churton." (Page 607)*

When the case went on appeal to the House of Lords, Lord Pearson referred to the above passage, and said:

> "Now *Dodd -v- Churton* does ... not establish, or afford any support to, ... [that statement]."

There has been some debate as to what Lord Pearson meant. Was he saying that time does not become "at large" in such circumstances, or did he mean something else?

In *Commissioners of the State Bank of Victoria -v- Costain Australia Ltd.* (Supreme Court of Victoria, 28/10/83, reported at 5 BCLRS 193), Gobbo J. said:

> "It is to be noted that Lord Pearson expressly rejects the passage [of Lord Denning M.R.'s judgment] that treats *Dodd -v- Churton* as supporting a reasonable extension for delay — at any rate by way of an implied term."

In the first supplement by I.N. Duncan Wallace Q.C. to the 10th Edition of *Hudson*, the view is expressed that Lord Pearson meant that a "reasonable time" in the present context "will not ... necessarily be the same as the contract period plus a reasonable extension for the delay caused by the employer". See notes to page 633.

Keating (4th Edition), at page 155, opines that there is doubt whether time becomes "at large", but puts forward the view that the Owner cannot recover common law damages from the contractor "from a date earlier that that when the works could have been completed but for [the owner's] delay".

Assuming the principles to be as stated at the commencement of this section, the logical position is that a reasonable time involves a calculation of when the contractor can be required to complete, taking into account:-

(a) his original bargain as to the time within which he agreed to complete;

(b) acts of prevention by the owner; and

(c) neutral delaying events in respect of which the contractor is entitled to an extension of time in accordance with the extension of time clause.

On the basis of the authorities as they stand at the moment, it is not certain that this logical position will be accepted by the Courts. It is not, however, necessarily in conflict with existing authority.

1.5 WHEN CAN THE POWER TO EXTEND TIME BE EXERCISED?

1.5.1 General

This section deals with the question of when the power to extend can be exercised, and should be distinguished from second question of when the power to extend **should** be exercised (which is discussed in Section 1.6 below). The first question deals with the problems of when and in what circumstances it is too late for the power to be validly exercised.

The second question deals with whether there is any obligation upon the superintendent to make his decision with a limited time, notwithstanding that the power to extend can (in accordance with express provisions of the contract) be validly exercised at any time.

These two questions are not considered separately in the cases in this area and are obviously related to some degree. For instance, in *MacMahon Constructions Pty Ltd v Crestwood Estates* [1971] WAR 162, it was held that, if upon the proper construction of the power to extend, the power should be exercised within a given period of time (either fixed or reasonable), then a purported exercise of the power outside of that time is ineffective. See page 167 per Burt J.

However, while the two questions may be related in some cases, it is useful to consider them separately.

The following matters will be considered in this Section:

(a) The requirements of the specific clause;

(b) Does the clause allow for extensions for the owner's own delay?

(c) Does the power have to be exercised by any particular time, e.g. before the present completion date?

(d) Time limitations for a valid exercise of the power to extend.

1.5.2 The requirements of the specific clause

This aspect is considered in detail in section 2.0 of this paper. However, it is clear that the power to extend time can only be exercised in accordance with the provisions of the particular clause and after compliance by the contractor with its requirements (if necessary).

Broadly speaking, the following needs to be complied with:

(a) the matters for which the extension is sought must be one of the grounds set out in the clause for which the contractor may claim an extension of time;

(b) the contractor should have given to the superintendent all notices required by the clause (e.g., both notice of delay and notice of intention to claim an extension); and

(c) any other formal requirements set out in the particular clause.

1.5.3 Does the clause allow for extensions for the owner's own delays?

The English Court of Appeal held in *Peak's Case* that the "prevention" principle will be applicable unless the extension of time clause allows the owner (or the superintendent on his behalf) to extend time for the owner's own delays.

It appears that the extension of time clause should *expressly* contain this power, because:

(a) Liquidated damages and extension of time clauses will be construed contra preferentem against the owner. See *Perini Pacific Ltd v Greater Vancouver Sewerage and Drainage District* (1966) 57 DLR (2d) 307; *MacMahon Construction Pty Ltd v Crestwood Estates* [1971] WAR 162; and Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd (1970) 1 BLR 111.

(b) General expressions such as "or other causes beyond the control of the builder" will not be taken to include the owner's own delays. See *Perini Pacific Ltd v Greater Vancouver Sewerage and Drainage District* (Supra) at page 321 per Bull J.A.; and *Fernbrook Trading Co Ltd v Taggart* [1979] 1 NZLR 557 at 569-571.

Because of the view which the courts have taken of the power to extend time, it is necessary for an owner to be able to extend time for his own acts of prevention, whether or not the contractor seeks an extension of time for such events. Unless the extension of time clause contains such a provision, the contractor may well be able to rely on the prevention principle by making no applications for extensions of time for the owner's acts of prevention. As the authorities stand, the owner will then be unable to adjust the completion date to take account of his acts of prevention and the same consequences as in *Peak's Case* (supra) will follow.

Accordingly, all the standard forms enable extensions of time to be granted without the necessity for an application by the contractor. See E5b Clause 24(f), AS 2124-1981 Clause 36.4, NPWC3 Clause 35.4, and JCC A Clause 9.05.

1.5.4 Does the power have to be exercised by any particular time?

The issue here is whether there is (either express or implied in the contract) any date or time after which the power to extend cannot validly be exercised. If the contract specifically provides, as in the case of NPWC 3, that the power can be exercised at any time prior to final completion, there can be little debate on the question. It is however of relevance where the contract is silent on this point.

As *Hudson* states at page 644:-

> "It seems that where there is power to extend the time for delays caused by the building owner, and such delays have in fact taken place but the power to extend the time has not been exercised due to failure to consider the matter within the time expressly or impliedly limited by the contract, the building owner may have lost the benefit of the clause. The contract time has in such case ceased to be applicable because of the employer's act of prevention,

there is no date from which penalties can run because any purported extension of time is given too late, and therefore no liquidated damages can be recovered. This would seem to be yet another example of the severity with which the Courts in the past have tended to interpret extension of time clauses in cases of prevention, where the clause is regarded as more for the benefit of the employer than the contractor, and if possible, is held inapplicable so as to invalidate the liquidated damages clauses as a whole. In principle on this very strict view there seems no reason why a purported extension of time that is too late should not have an equally invalidating effect in cases where no element of prevention is present and the cause of delay is clearly a matter otherwise within the contractor's sphere of responsibility, as eg. bad weather."

Thus, if the power to extend is not validly exercised by the superintendent within the time expressly or impliedly limited by the contract, it is strongly arguable that the power can no longer be exercised, and that the *Peak* principle is enlivened.

An example of this principle in operation is the case of *MacMahon Constructions Pty. ltd. v Crestwood Estates* [1971] WAR 162. That case involved two drainage/road construction contracts, with the general conditions being CA24.1-1964. The owner had ordered certain variations, and the contractor had applied in late November 1969 for extensions of time in relation to those variations. The engineer did not make his decision until late April 1970, when he awarded some extensions of time.

The question arose whether the engineer had validly extended time.

Burt J. of the Supreme Court of Western Australia held that Clause 35.2 of CA24.1-1964 (the extension of time clause) did not apply to delays caused by variations. However, he said (obiter) that, if Clause 35.2 had applied to variations then the clause:-

> "Upon its proper construction would require that the Engineer direct his mind to the claim and reach his opinion upon it, and act as his opinion may require within a reasonable time of it being made." (Page 168)

He stated that a delay by the engineer from late November 1969 to late April 1970 was not a "reasonable time". On that basis he held:-

> "Hence if the power to extend is to be found within this clause the power was not exercised within the time limited by the contract."

Burt J. also stated at page 167:-

> "An 'extended time', should it exist, must be the product of the proper exercise of a power appropriate to the circumstances to be found in the contract and by a 'proper exercise' I mean that if, upon the proper construction of the power to extend, it should appear that the power must be exercised within a period of time either fixed or reasonable, then a purported exercise outside that time is ineffective and there then being no date from which liquidated damages can run, the building owner loses the benefit of that provision . . . ."

Accordingly, there had been no valid exercise of the power to extend time, and the "prevention" principle applied. As a consequence, the owner was precluded from enforcing liquidated damages against the contractor.

What is "the time expressly or impliedly limited by the contract" for the exercise of the power to extend?

Three aspects of this question will be considered.

First, if the contract specifically sets a time limit for the exercise of the power, then that time limit will be operative.

Secondly, is it possible for the power to be exercised retrospectively, i.e. so as to nominate a new completion date which is a date that has already passed? Thirdly, should the power be exercised when the delay first occurs, or may it be exercised after the full impact of the delay in question is known?

In *Miller v London County Council* (1934) 50 TLR 479, the engineer had purported to grant an extension of time some four months after the completion of the building. It was held that the power to extend had not been validly exercised within the time specified by the contract, and that therefore the purported extension was of no effect. du Parcq J. in that case appeared to favour the view that the power must be exercised before the new completion date.

However, in *Amalgamated Building Contractors Ltd v Waltham Holy Cross Urban District Council* [1952] 2 All ER 452, Denning L.J. (as he then was), after distinguishing *Miller v London County Council* on somewhat dubious grounds, held that there was no general rule that the power to extend cannot be exercised so as to nominate a date which has already passed. He explained the problem as follows (at pages 454-455):

> "The point in this case is therefore: was the extension, given on December 20, 1950, extending the time to May 23, 1949, valid or not? The contractors say that the words in clause 18 "the architect may make a fair and reasonable extension of time for completion of the works" mean that the architect must give the contractors a date at which they can aim in the future, and that he cannot give a date which has passed. I do not agree with this contention. It is only necessary to take a few practical illustrations to see that the architect, as a matter of business must be able to give an extension even though it is retrospective. Take a simple case where the contractors, near the end of the work, have overrun the contract time for six months without legitimate excuse. They cannot get an extension for that period. Now suppose that the works are still uncompleted and a strike occurs and lasts a month. The contractors can get an extension of time for that month. The architect can clearly issue a certificate which will operate retrospectively. He extends the time by one month from the original completion date, and the extended time will obviously be a date which is already passed. Or take a cause of delay, such as we have in this case, due to labour and materials not being available. That may cause a continuous delay operating partially, but not wholly, every day, until the works are completed. The works do not stop. They go on, but they go on more slowly right to the end of the works. In such a case, seeing that the cause of delay operates until the last moment, when the works are completed, it must follow that the architect can give a certificate after they are completed. These practical illustrations show that the parties must have intended that the architect should be able to give a certificate which is retrospective, even after the works are completed."

In addition, Denning L.J. stated that there was a distinction to be drawn in cases where the delay in question was in no way due to the fault of the owner.

Keating, at page 161, states that that distinction has the following effect:

> "Where delay is solely caused by the employer, then unless clear words are used, a power to extend time because of the employer's delay cannot, it seems, be exercised retrospectively."

It remains to be seen whether the Courts will adopt this view, although the distinction was treated as significant by Roper J. in *Fernbrook Trading Co Ltd v Taggart* [1979] 1 NZLR 556 at 562-566.

Hudson, at pages 644-646, sums up this area of the law by concluding that, unless there is an indication to the contrary in the contract, an extension of time can be granted at any time up until the issue of the final certificate, even retrospectively. However, this conclusion should be contrasted with the third point made below.

As to the third point it is possible that, if the extension of time clause is silent as to when the power to extend must be exercised, there could be an implied requirement that the power to extend must be exercised within a reasonable time.

MacMahon Construction Pty Ltd v Crestwood Estates (supra), discussed above, is one example where it was held that the superintendent must make his decision within a reasonable time.

Likewise, in *Perini Corporation v Commonwealth of Australia* (supra), Macfarlan J. held that, in that particular case, the superintendent had to give his decision within a reasonable time. See page 539 in particular.

What, then, is a "reasonable time" in this context? The answer is not an easy one to find, and it is dangerous to generalise about the matter.

In *MacMahon Constructions Pty Ltd v Crestwood Estates* (supra), Burt J. held that a delay between late November 1969 and late April 1970 (ie. approximately 5 months) was not a "reasonable time".

In *Perini Corporation v Commonwealth of Australia* (supra) at page 539 MacFarlane J. said at page 539:

> "The measurement of a reasonable time in any particular case is always a matter of fact. Plainly the [superintendent] must not delay, nor may he procrastinate, and in my opinion he is not entitled simply to defer a decision. On the other hand he is, in my opinion, and this follows from the nature of his obligation to give his own personal decision on the point, necessarily obliged to have available for that consideration such time as is necessary to enable him to investigate the facts which are relevant to making it. When that investigation is complete I am of the opinion that his decision should then be made."

In *Fernbrook Trading Co Ltd v Taggart* (supra), Roper J. said at page 568:

> "I think it must be implicit in the normal extension clause that the contractor is to be informed of his new completion date as soon as is reasonably practicable. If the sole cause is the ordering of extra work then in the normal course the extension should be given at the time of ordering so that the contractor has a target for which to aim. Where the cause of delay lies beyond the employer, and particularly where its duration is uncertain then the extension order may be delayed, although even there it would be a reasonable inference to draw from the ordinary extension clause that the extension should be given a reasonable time after the factors which will govern the exercise of the Engineer's discretion have been established. Where there are multiple causes of delay there may be no alternative but to leave the final decision until just before the issue of the final certificate."

Thus the question of what is a "reasonable time" must depend on the individual facts in each and every case, with all relevant circumstances being taken into account. The particular facts of previous decisions as to what is or is not a "reasonable time" can only serve as a general guide, and that there is no magic in, for instance, a decision that a delay of (for example) three months is or is not a "reasonable time".

1.6 WHEN SHOULD THE POWER TO EXTEND BE EXERCISED?

Here it is intended to consider whether there is a limited time within which the power to extend **should** be exercised, even though it **can validly** be done at any time.

It is necessary at first to establish whether, where the power to extend can be **validly** exercised at **any** time prior, for instance, to final completion (see, e.g., NPWC 3 Clause 35.4 and AS2124-1981 Clause 36.4), there is an implied obligation for the superintendend to exercise the power within some limited time after the contractor applies for the extension.

Where the power can validly be exercised at **any time**,, then until such time as the power is exercised the contractor is placed in a difficult position.

On the one hand he has been delayed, and on the other hand he is still obliged to continue with the works, so as to meet the as yet unextended completion date.

This issue has not been considered in the decided cases which have all been concerned with contracts which contained no express right to extend at any time. However, there are grounds for contending that a superintendent does have an implied obligation to act within a reasonable time of reviewing an application for extension of time, notwithstanding his power to do so at any stage. Such an implied obligation is consistent with all good principles of successful project management.

If the contractor does accelerate during that period of uncertainty (so as to meet the unextended completion date), there is a possible argument open to the contractor that he has a right to claim damages arising from the failure by the superintendent to deal with the extension of time question in a timely fashion.

However, for this to apply there would need to be:

(a) a delay which entitles the contractor to an extension of time;

(b) a specific claim for an extension of time within the time prescribed;

(c) the failure or refusal to grant the extension;

(d) an express order to keep on the program or evidence that this was required; and

(e) evidence of actual acceleration.

Damages recoverable in this way are similar to those

referred to in the United States as recoverable under the doctrine of "constructive acceleration".

The possibility of claiming damages for breach of the suggested implied term is enhanced by the obiter remarks of Macfarlan, J. in *Perini Corporation v. Commonwealth* (supra) where he suggested that a right to recover damages may well attach for breach of a similar implied term (see p.543 at line 25).

1.7 FLOAT

There is an active and ongoing debate in the construction industry about the question: "Who owns the float?" As this is an issue closely related to the legal basis of extensions of time it is proposed to briefly address the question in this paper.

The issue as discussed here is whether, when a contractor is delayed in relation to a non-critical activity, for a period less than sufficient to render the particular activity critical, a contractor is entitled to an extension of time for a period of delay, thus maintaining the buffer of float which he had allowed in respect of the particular activity.

The allowance of float in programming is obviously desirable from a project management point of view, and there can be little serious debate about the proposition that a contractor should be given the opportunity to properly plan for the execution of the works for which it is responsible. It is not, however, proposed to debate the concept of float from a project management point of view in this paper, but rather to look at two legal issues which are relevant to determine a contractor's entitlement to an extension of time where there is a delay such as described above.

The first and most important issue is whether the particular extension of time clause entitles the contractor to an extension of time in the event of delay simpliciter, or whether the extension of time entitlement arises only where an event delays the completion of the works.

In the latter case, it is difficult to establish an entitlement to an extension of time in respect of a delay to an activity which is not critical.

The critical path changes as work progresses and delay to what was once a non-critical activity can ultimately delay the completion of the works because of subsequent events. This is the other side of the coin of the time within which it is reasonable for a decision to be made about an extension of time. In a complex project it is often better to wait some time to assess the ultimate effect of a particular delaying event.

The second issue is that what are or are not critical activities depends of course upon the particular program. It is possible, by alteration of programming philosophy, to change a critical path and make non-critical activities, critical. The debate about who owns the float must take account of the extent to which a contractor is at liberty to establish his own program for the purpose of meeting particular completion dates. In the event that the contractor has a fair degree of control over his programming, then he can, by adjusting a particular program establish the criticality of an activity and thus manoeuvre to maintain control over allowances for float.

Any analysis of delay is complex. It is essential to recognise in considering the ultimate effect of a delaying event that, generally speaking, it is the contractor who has the responsibility of marshalling his resources so as to meet a particular completion date. Very clear words indeed would be necessary before the contractor could be deprived of the right to plan and marshall his resources in the most efficient way.

It is suggested that a right to extension of time depending upon the contract completion date being delayed, must involve a consideration of whether a delay to a non-critical activity will ultimately delay the completion date unless the contractor re-allocates resources to overcome the delay and the disruption caused by it. The execution of construction work necessarily involves finite resources. The contractor must, generally speaking, be entitled to determine the way in which he uses those resources. Thus, although it may appear at first instance that delay to a non-critical activity cannot ultimately be causative of delay, it is suggested that it will be unusual for this to be the case when the delaying event is considered in the context of the contractor being entitled to mobilise efficiently for a tight schedule. The reality of this position has been recognised by the Courts and in particular by Gobbo J. in *Commissioners of the State Bank of Victoria v. Costain Australia Limited* (Supreme Court of Victoria, 28/10/83, (1983) 2 A.C.L.R. 1). When considering the question of extensions of time under E5b, Gobbo J. said:

> "Though the Builder may be under a general duty to minimise the effect of any delays, he is not in my opinion obliged to recast his operations significantly and thus accommodate extra work and obviate the need for an extension of time. Another situation that is similar, though not one within the Proprietor's submissions, is that where the Builder has, by careful management, husbanded some saving in time. In that situation the Builder should not be deprived of the benefit of such saving. Where an Architect, with the benefit of knowledge of all the actual circumstances, makes a fair and reasonable extension, it seems unlikely that he would be able, in effect, to deprive the Builder of the benefit of this saving by allocating it only to the extra work. There is some support for this approach in the remarks of Vaughan Williams, L.J. in *Wells v. Army & Navy Co-operative* set out in Hudson on Building Contracts, 4th Edition, Volume 2, 346 at 355."

There can be no simple legal answer to the question of who owns the float. It is suggested however that the contractor is not without argument to establish his interest in the float.

It is a pity that such an important management issue is not adequately addressed in any of the current standard forms of contract.

Editor's Note: The second part of this paper will appear in the March 1986 issue of A.C.L.R.).